Office Supreme Court, U.S.
FILED
APR 26 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1055

NATHAN CARL SCHWARTZ,

Petitioner,

against

HEYDEN NEWPORT CHEMICAL CORPORATION and HEYDEN CHEMICAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

ALFRED S. JULIEN,
Counsel for Petitioner,
2 Lafayette Street,
New York, N. Y.

DAVID G. LUBELL,
LUBELL, LUBELL AND JONES,
165 Broadway,
New York, N. Y.,
Of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting the Writ	5
POINT I—Where the injury sustained is inherently unknowable at the moment of impact, the application of the period of limitation from that time is so unreasonable as to constitute a denial of due process	5
POINT II—Where it is held as a matter of law that injury occurred at the moment of injection of a carcinogenic substance and petitioner's complaint is therefore dismissed as time barred, petitioner is thereby denied a hearing mandated by due process on the issue of fact as to when injury actually occurred	10
Conclusion	13

APPENDIX

Opinion of Supreme Court, New York County, State of New York	1a
Opinion, and Dissenting Opinion of Court of Appeals of New York	4a
Judgment and Amended Remittitur of Court of Appeals of New York	13a

Cases:

	PAGE
Ayers v. *Morgan*, 397 Pa. 282, 154 A. 2d 788	9
Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673, 681, 682	11
Brush Beryllium Co. v. *Meckley*, 284 F. 2d 797	8
Coots v. *Southern Pacific Co.*, 49 C. 2d 805, 322 P. 2d 460	9
Fernandi v. *Strully*, 35 N. J. 434, 173 A. 2d 277	8
Handler v. *Remington Arms*, 144 Conn. 316, 130 A. 2d 793	8
Herbert v. *Louisiana*, 272 U. S. 312	13
Holden v. *Hardy*, 169 U. S. 366, 390	11
Hutchison v. *Semler*, 227 Or. 437, 361 P. 2d 803	9
Milde v. *Leigh*, 75 N. D. 418, 28 N. W. 2d 530	12
Powell v. *Alabama*, 287 U. S. 45, 68	11
Ricciuti v. *Voltarc Tubes, Inc.*, 277 F. 2d 809	8
Slochower v. *Board of Ed. of N. Y.*, 350 U. S. 551	13
United States v. *Reid*, 251 F. 2d 691	12
Urie v. *Thompson*, 337 U. S. 163	6, 7
Wheeler v. *Jackson*, 137 U. S. 245, 255, 258	6

Constitutions and Statutes:

United States Constitution, Fourteenth Amendment	2, 3, 4, 5
28 U. S. C. 1257(3)	2

Miscellaneous:

2 Cooley, *Constitutional Limitations*, p. 764 (8th ed. 1927)	6
Comments, 1954 Wis. L. Rev. 277	9
2 Frumer & Friedman, *Products Liability*, Section 39.01[3] p. 504	9
63 Harv. L. Rev. 1177, 1207 (1950)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

NATHAN CARL SCHWARTZ,

Petitioner,

against

HEYDEN NEWPORT CHEMICAL CORPORATION
and HEYDEN CHEMICAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on January 23, 1963.

Opinions Below

The opinion of the Supreme Court, New York County, State of New York, on respondents' motion to dismiss the complaint on the ground that maintenance of the action was time-barred by the statute of limitations is printed

in the Appendix and is reported in 30 Misc. 2d 663, 219 N. Y. S. 2d 98. No opinion was rendered by the Appellate Division, First Department, State of New York in its memorandum decision reported in 15 App. Div. 2d 650, 224 N. Y. S. 2d 270. The opinion of the Court of Appeals of the State of New York, printed in the Appendix, is reported in 12 N. Y. S. 2d 212. The Court of Appeals amended remittitur, printed in the Appendix, has not been reported officially or unofficially but was published in the New York Law Journal, April 1, 1963.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on January 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Questions Presented

Whether, in an action for personal injuries caused by negligence, a holding that the statute of limitations does not commence to run from the date of discovery of an injury, unknowable in nature and non-discoverable at the time of the negligent act, the injection into petitioner of a carcinogenic substance, and that as a matter of law injury must be held to have occurred at or about the time of said injection, violates the Due Process Clause of the Fourteenth Amendment where:

1. There are no facts in the record showing that petitioner actually sustained bodily injury at or about the time of injection rather than subsequently thereto.
2. Any injury petitioner sustained at the time of injection was inherently unascertainable at that time.

3. The case is decided on the pleadings alone, thus, in effect, denying petitioner a hearing on the issue of fact as to when he actually sustained bodily injury.

Constitutional Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *."

Statement of the Case

This action was instituted in the Supreme Court, New York County, State of New York on or about November 20, 1959 by petitioner to recover damages for negligence and breach of warranty. The complaint alleged that:

By reason of respondents' negligence the petitioner, a practicing attorney of the Commonwealth of Pennsylvania, had his left eye and part of his facial bones removed because of carcinoma of the left maxillary antrum.

While petitioner was in the Armed Forces, a chemical known as "Umbrathor", manufactured and sold by respondents, was inserted in his sinuses in order to X-ray them at a Naval hospital in 1944.

In or about February 1957, as a result of the remains of the "Umbrathor" within petitioner's head, carcinoma developed requiring his operation and loss of the left eye.

It was petitioner's theory that only in or about February, 1957 was he able to discover that he had carcinoma of his left maxillary antrum. Only in 1957 did the carcinoma manifest itself (App. 11a, Complaint, Par. "Ninth").

The petitioner contended that the respondents were negligent in that they manufactured and sold "Umbrathor" for use on human beings when they should have known that the same was radium active and carcinogenic and further that after they should have learned that the commodity was dangerous they neither recalled it from public use nor warned the members of the public who had been exposed to it, of its latent lethal potential.

The Supreme Court, Special Term, New York County, dismissed the action as time barred and the petitioner appealed. The Supreme Court, Appellate Division, First Department, unanimously affirmed without opinion and the petitioner appealed by permission to the Court of Appeals, State of New York. The Court of Appeals held that the action was barred both under the three year limitation period applicable to actions for negligence and the six year period applicable to actions for breach of warranty.

In its argument before the Court of Appeals, petitioner argued that it was entitled to a hearing on the issue of fact as to when injury was actually sustained and that any dismissal of the action on the pleadings alone would therefore deprive petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

On motion by petitioner after judgment, the Court of Appeals amended the remittitur by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that the statute of limitations commenced to run in 1957, when he first was able to discover an injury caused by a 1944 injection of a carcinogenic substance, and that a holding by this court as a

matter of law that the actionable injury was sustained prior to that time would deprive appellant of due process of law in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held that in an action for personal injuries caused by negligence the cause of action accrues and the statute of limitations commences to run when the negligence produces injury and that the injury occurred when the harmful substance first acted upon appellant's body at or about the time of injection in 1944, appellant's lack of knowledge notwithstanding."

Reasons For Granting The Writ

The decision of the Court of Appeals of the State of New York should be reviewed because it erroneously decided an important question of federal constitutional law which has not yet been settled by this court, viz: the extent to which the Due Process Clause of the Fourteenth Amendment of the United States Constitution limits a state's power to deprive a claimant of a personal injury cause of action on the ground of the running of the period of limitation despite the fact that injury is not ascertainable at the moment of the negligent act and claimant is prevented from proving that the injury in fact resulted after impact.

POINT I

Where the injury sustained is inherently unknowable at the moment of impact, the application of the period of limitation from that time is so unreasonable as to constitute a denial of due process.

It is well established that all statutes of limitation must proceed on the idea that the injured party has had full opportunity afforded him to try his right in the courts.

A statute could not bar the existing right of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. 2 Cooley, *Constitutional Limitations*, page 764 (8th ed. 1927).

As this Court stated in *Wheeler* v. *Jackson*, 137 U. S. 245, 255, 258:

> "It is the settled doctrine of this court that the Legislature may prescribe a limitation for the bringing of suits * * * provided in each case, a reasonable time, taking all the circumstances into consideration be given * * * for the commencement of suit before the bar takes effect.
>
> * * * * *
>
> "A Statute of Limitation cannot be said * * * to deprive one of property without due process of law, unless, * * * it unreasonably limits the opportunity to enforce that right by suit."

It is petitioner's contention that in order for the operation of a statute of limitations to meet the constitutional criterion of reasonableness, the injured claimant must have had an opportunity to discover the fact that he had actually been injured. Surely it is unreasonable for purposes of the Due Process Clause to hold that the period of limitations has run in a case like the instant case where the carcinogenic qualities of the injection petitioner received in 1944 were not discoverable until 1957, after the limitation period had elapsed.

The instant case presents to this Court for apparently the first time the opportunity to determine to what extent the Constitutional requirement of reasonableness applies to a state determination of time of accrual of a cause of action and whether such requirement is not met where

the period of limitations commences at a time when the fact of injury was unknowable. As shown immediately below, past decisions have frequently found that the cause of action commences upon discovery or discoverability. These decisions were based upon a fundamental sense of justice and fairness. That this sense of justice and fairness is also a constitutional requirement of due process is petitioner's contention herein.

In the leading case of *Urie* v. *Thompson*, 337 U. S. 163, the United States Supreme Court was faced with the problem of establishing when the period of limitations commenced to run where the injured plaintiff had contracted silicosis, a slow growing, progressively worsening disease. The plaintiff there had been exposed to silica dust since 1910. The action was filed on November 21, 1941, within three years after the plaintiff had discovered that he had silicosis. The court held that the period of limitations commenced to run when the injured plaintiff discovered that he had silicosis. The Supreme Court, after a thorough analysis, unequivocally rejected the argument that the limitations period should commence from the date the injured plaintiff started to breathe in the silica dust. The court emphasized the unknown and inherently unknowable nature of the injuries sustained. It stated that if plaintiff was to be barred by the statute of limitations (at 337 U. S. 169):

> "It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs, under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability."

The court specifically placed its decision within the salutory purpose of a limitation statute, stating at page 170:

> "Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at an earlier date."

To the same effect, it was held in *Ricciuti* v. *Voltare Tubes, Inc.*, 277 F. 2d 809 (2nd Cir. 1960), that the statute of limitations began to run when the plaintiff's disease was diagnosed, the court stating, in language directly applicable to the facts in the case at bar, at page 813:

> "We think it unreasonable to hold that the statute of limitations begins to run against an injured person at a time when he does not in fact know, and could not with the exercise of reasonable care and diligence know, what his injury is. To so hold would nullify any right to recover for many serious but slowly and insidiously developing diseases. We hold, therefore, that in this case the statute of limitations began to run on January 27, 1956, the date on which the plaintiff's disease was diagnosed, unless the defendant can show that the plaintiff should, in the exercise of reasonable diligence, have earlier discovered the nature of his disease."

See also *Brush Beryllium Co.* v. *Meckley*, 284 F. 2d 797 (6th Cir. 1960), where the plaintiff had contracted berylliosis through exposure to noxious gases over a period

of years, through defendant's negligence. The federal court held that the Ohio statute of limitations of two years for personal injuries only commenced to run "when the accumulated effects of the deleterious substance manifest themselves" (at p. 800).

The sound reasoning of the foregoing authorities has been followed by many state courts which have held that the limitations period in injuries which are unknowable and undetectable, such as in the case at bar, begins to run from the date of discovery of the injury.

See, e.g.: *Fernandi* v. *Strully*, 35 N. J. 434, 173 A. 2d 277 (1961); *Handler* v. *Remington Arms*, 144 Conn. 316, 130 A. 2d 793 (1957); *Ayers* v. *Morgan*, 397 Pa. 282, 154 A. 2d 788 (1959); *Hutchison* v. *Semler*, 227 Or. 437, 361 P. 2d 803 (1961); *Coats* v. *Southern Pacific Co.*, 49 C. 2d 805, 332 P. 2d 460 (1958).

Law journals and treatises have uniformly urged that where the injury sustained is inherently unknowable and unascertainable, the period of limitations should commence from the date of discovery of the injury.

63 Harv. L. Rev. "*Developments in the Law-Statute of Limitations*" 1177, 1207 (1950), states in particularly appropriate language:

> "Although the fact that most courts will not begin the period until there has been some impact will assure that in most cases the plaintiff will know of his injury before the remedy is barred, where the initial invasion is of an 'inherently unknowable' type the period should be postponed until the plaintiff should reasonably learn of the cause of action whether the defendant's conduct ceases before or after the manifestation of harm. Thus, where the harm develops gradually * * * limitations should run from the manifestation of substantial harm rather than from the first impact * * *. Nevertheless,

> some courts have begun the period at the time of the impact, for instance the inhaling of silica dust * * *. It would seem preferable, in all cases where the harm is of a gradually increasing and inherently unknowable nature, to delay commencement of the statutory period until manifestation of substantial harm."
>
> See also, *Comments*, 1954 Wis. L. Rev. 277.

Finally, in the leading text, 2 Frumer & Friedman, *Products Liability*, Section 39.01 [3] page 504, it is stated:

> "It is, of course, clear that a product can cause a disease which will not manifest itself immediately after exposure to the disease. It would seem that in such cases plaintiff's cause of action should not accrue until his disease was diagnosed or until he should have discovered the nature of his disease. It has been so held in a number of fairly recent products liability cases."

POINT II

Where it is held as a matter of law that injury occurred at the moment of injection of a carcinogenic substance and petitioner's complaint is therefore dismissed as time-barred, petitioner is thereby denied a hearing mandated by due process of the issue of fact as to when injury actually occurred.

As this Court has pointed out on numerous occasions, the true meaning of the concept of due process, while difficult of definition, encompasses within its confines the right to be heard or the right to a hearing.

> "Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be

> taken * * * without an opportunity of being heard in his own defense." *Holden v. Hardy*, 169 U. S. 366, 390.

The crucial importance of affording an opportunity to be heard was made clear by Mr. Justice Brandeis, speaking for the Court, in *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 681, 682:

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether it has had an opportunity to present its case and be heard in its support. * * * But while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

So, too, it was held:

> "It has never been doubted * * * that notice and hearing * * * constitute basic elements of the constitutional requirement of due process of law."
>
> *Powell v. Alabama*, 287 U. S. 45, 68.

It is crystal clear that inasmuch as the complaint in the present case was dismissed on the pleadings alone, petitioner was never afforded an opportunity to be heard on the vital issue of fact as to when injury was actually sustained. The unwarranted holding that as a matter of law injury must have occurred at the time of the act of

injection is arbitrary and highly unreasonable inasmuch as the record is totally devoid of any facts showing that damage resulted at the time of injection.

Directly applicable is the decision of the Fifth Circuit in *United States* v. *Reid*, 251 F. 2d 691 (5th Cir. 1958), where the plaintiffs sued on the basis of the defendant's failure to properly report a tuberculin condition which was shown on plaintiff's X-rays. Plaintiff discovered the condition within the statutory period of two years to bring the action but filed the action more than two years after the negligent failure to properly read the X-rays. The court held the statute of limitations was not a bar. The court states at pages 694-695:

> "But *it is not the wrongful, i.e., negligent act, which gives rise to the claim.* For there must be damage caused by it.' Until there some damage, there is no claim and certainly a statute prescribing the time in which suit must be filed (whether as a condition of right or remedy) can never operate prior to the time a suit could be permitted." (Emphasis supplied.)
>
> • • • • •
>
> "We know that immediately upon Dr. Lowe's giving Reid the wrong advice, no harm from it had yet befallen Reid. All that occurred was that Reid heard words—words which were wrong and negligently spoken—but without injurious consequences of any kind at the moment • • •. Whatever the precise moment, we know absolutely that it was some time later—between March 10, 1949 and February 16, 1950—that the first injurious consequence of faulty advice would have occurred."

Cf. *Mildi* v. *Leigh*, 75 N.D. 418, 28 N.W. 2d 530 (1947) (husband's action for loss of services for defendant-doctor's negligent operation to sterilize wife only began to run when wife subsequently gave birth to a child).

Similarly, in the case at bar, there is no rational basis for holding that any injurious consequences resulted at the moment of injection. A carcinoma did not thereupon immediately come about, but rather developed gradually over the course of many years. Thus, it follows that petitioner was not damaged until some point in time far beyond the instant of injection. Any other conclusion would deny petitioner that protection from arbitrary action which is the very essence of due process of law. *Slochower v. Board of Ed. of N. Y.*, 350 U. S. 551.

It is therefore submitted that petitioner should be given his day in court to present proof showing that in fact no injury was sustained by him in an ascertainable sense until 1957. Only in this way will it be possible to apply the appropriate period of limitation in a manner consonant with the basic concepts of due process—"fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Herbert v. Louisiana*, 272 U. S. 312.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED S. JULIEN
Counsel for Petitioner.

DAVID G. LUBELL
LUBELL, LUBELL and JONES
Of Counsel.

Dated: New York, New York
April 12, 1963

APPENDIX

Opinion of Supreme Court, New York County, State of New York

Defendant moves for dismissal of the complaint upon the ground that maintenance of the action is time-barred.

In three causes of action based on negligence, breach of warranty by advertising, and breach of warranty, plaintiff claims that his claim of right to recover for personal injuries arose upon discovery of the negligence and breach of warranty. While a member of the Armed Forces, "Umbrathor," a product manufactured by the defendant, was injected into plaintiff's body to make the sinuses perceptible in X-rays. A portion of the product so inserted in 1944, was not removed after the X-rays, remained in his head, caused a cancerous condition for which he was operated in 1957, resulting in the loss of his left eye. It is alleged that the existence of the carcinoma was discovered in February, 1957.

There is a conflict of opinion with respect to the principle involved in the Federal and several State jurisdictions. In New York the law has been settled in Schmidt v. Merchants Despatch Transportation Company (270 N. Y. 287). There the plaintiff had inhaled foreign substances in the form of dust and as a result contracted a disease of the lungs. In the course of its opinion, the court stated, at page 300: "Accordingly, the plaintiff claims that his cause of action accrued, not at the time he inhaled the dust more than three years before the action was commenced but at the time when the dust, so inhaled, resulted in a disease of the lungs and that date, it is said, can be determined only by medical testimony. * * * There can

be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury. * * * That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. * * * The injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust. For that injury, including all resulting damages the defendant was then liable. The disease of the lungs was a consequence of that injury. The result might be delayed or, perhaps, even by good fortune averted; nevertheless, the disease resulted naturally, if not inevitably, from a condition created in the plaintiff's body through the defendant's alleged wrong. It cannot be doubted that the plaintiff might have begun an action against the defendant immediately after he inhaled the dust which caused the disease."

Gile v. Sears Roebuck & Co. (281 App. Div. 95), is not to the contrary. There the defendant had in 1948, installed a floorboard which it had left in a loosened condition. In 1949, plaintiff sustained injury when she was caused to fall on the loosened floorboard. The injury which resulted from any breach in the installation of the floorboard in relation to the performance of the contract is different from the injury sustained at the time of the occurrence

when, for the first time, the claim in suit there arose. The injury in the instant case and, therefore the cause of action, arose when the substance manufactured by the defendant was injected into the plaintiff's body and the consequential injury flows therefrom and not from any act occurring thereafter.

Whatever may be said concerning the claimed injustice of the rule as enunciated in the *Schmidt* case, this court regretfully feels precluded thereby and constrained to grant the motion. Defendant is awarded judgment dismissing the complaint.

Opinion and Dissenting Opinion of Court of Appeals of New York

BURKE, Judge.

The sole issue on this appeal, by leave of this court, is whether an order granting defendant's motion to dismiss the complaint on the ground that the action is barred by the Statute of Limitations was proper. We think it was.

In 1944, when plaintiff was in a Naval hospital, a product called "Umbrathor", manufactured by defendant, was inserted into plaintiff's sinuses for the purpose of making them perceptible in X-rays. Some of the substance allegedly remained in plaintiff's head and produced a carcinoma requiring the removal of an eye in 1957. This action was commenced in 1959. Plaintiff asserts three different bases of liability for the injury allegedly caused by defendant's product. The substantive merits are not now before us and the sole question is the availability of the defense of the Statute of Limitations respecting each asserted basis of liability.

The second and third causes of action are essentially the same. The second alleges that defendant publicly advertised that Umbrathor was fit for use on humans and that it had been adequately tested and that these representations were false in that the tests were inadequate and the product was unsafe for human use. The third cause of action alleges that defendant warranted to the armed forces (presumably impliedly) that Umbrathor was merchantable and fit for human use. Where the warranty is as to suitability of the product sold, the limitation runs from the date of sale (Allen v. Todd, 6 Lans. 222 [1872]; Blessington v. McCrory Stores Corp., 305 N. Y. 140, 147, 111 N.E.2d 421, 423; Liberty Mut. Ins. Co. v. Sheila Lynn,

Inc., 185 Misc. 689, 692, 57 N.Y.S.2d 707, 709, 710, affd. 270 App. Div. 835, 61 N.Y.S.2d 373). In light of these decisions the courts below were correct in holding the warranty causes of action barred under subdivision 1 of section 48 of the Civil Practice Act as having been brought more than six years after the warranty was allegedly breached.

Plaintiff also alleges that defendant was negligent in that it should have known of the radioactive and carcinogenic properties of Umbrathor at the time it was marketed; and, further, that defendant was negligent in that it failed to warn the public and users of Umbrathor of its dangerous properties when it "knew or should have known" of such dangers, and that such duty to warn was a continuing one. First, we do not think, on the facts of this case, that plaintiff can bring himself outside the bar of the statute on a theory of a duty to warn. In Conklin v. Draper (229 App. Div. 227, 241 N.Y.S. 529, affd. 254 N.Y. 620, 173 N.E. 892) the plaintiff sought to avoid the bar of the Statute of Limitations for a malpractice action by alleging that, although more than two years had elapsed since defendant had left forceps in plaintiff's abdomen, defendant had a continuing duty to warn her of the presence of the forceps. In dismissing her cause of action for malpractice, the Appellate Division rejected plaintiff's argument of a continuing duty to warn as unsound (229 App. Div. 227, 230, 241 N.Y.S. 529, 532, 533). That this principle does not apply solely to malpractice actions is evident from this court's treatment of the complaint in Schmidt v. Merchants Despatch Transp. Co. (270 N.Y. 287, 200 N.E. 824, 104 A.L.R. 450, infra), where attempts to

avoid the bar of the Statute of Limitations for a negligence action, by alleging causes of action sounding in nuisance, breach of contract and fraudulent misrepresentation, were rejected. If the nature and origin of the liability asserted is a negligent act, the bar of the Statute of Limitations cannot be avoided through an allegation that defendant had a continuing duty to warn plaintiff of the possible damaging consequences resulting from the act alleged to be negligent. Any duty that may arise to recall the product from the market has no bearing on the rights of those to whom it had been administered years previously.

Turning to the basic negligence cause of action, it is apparent that the facts come within the holding of Schmidt v. Merchants Desp. Transp. Co. (270 N.Y. 287, 200 N.E. 824, 104 A.L.R. 450, supra). In Schmidt an action against a former employer to recover for pneumoconiosis, caused by inhalation of dust negligently allowed to accumulate in the air, was brought more than three years after the termination of the employment. The opinion of Judge Lehman recognizes the classic principal that 'in actions of negligence damage is of the very gist and essence of the plaintiff's cause.' Comstock v. Wilson, 257 N.Y. 231, 235, 177 N.E. 431, 432, 76 A.L.R. 676." The opinion goes on to say (270 N.Y. p. 300, 200 N.E. p. 827, 104 A.L.R. 450): "Through lack of care a person may set in motion forces which touch the person or property of another only after a long interval of time (Cf. Ehret v. Village of Scarsdale, 269 N.Y. 198, 199 N.E. 56 [102 A.L.R. 211]); and then only through new, fortuitous conditions. There can be no doubt that a cause of action

accrues only when the forces wrongfully put in motion produce injury. Otherwise, in extreme cases, a cause of action might be barred before liability arose." All of the text writers and relevant cases so hold. Cooley makes the point as well as any. A cause of action accrues upon the violation of a legal right. In certain cases growing out of the action for trespass, the right is to be free from direct invasions of persons or property. The wrong is done, the right violated, and the cause of action complete when the invasion takes place, independently of any actual pecuniary damages. In such cases the right is not to be trespassed upon. Some rights, however, of lesser antiquity, growing out of actions on the case, are not rights against technical invasions, but rather rights not to be damaged under certain circumstances. In such cases the wrong itself is not actionable, the right not violated, and the cause of action nonexistent until damage takes place. (1 Cooley, Torts [4th ed.], § 46.)

None of these views point to a discovery rule. They would indicate, however, that the action accrues only when there is some actual deterioration of a plaintiff's bodily structure. This is the reasoning of cases holding that the statute doesn't begin to run until the defendant's wrong harms the plaintiff. (Gile v. Sears, Roebuck & Co., 281 App. Div. 95, 120 N.Y.S.2d 258 [defective floor caused injury one year later; statute held to run from date of injury]; White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185 [1941] [statute held to run from date when lightning struck defectively installed lightning rod].) Since, then, the recognized damages in negligence cases are pain and suffering, loss of earnings and, we suppose, damage to

the structure of the body, it is questionable whether any cause of action exists before these things actually happen. But Judge Lehman's view in the Schmidt case is right as we must assume that the dust immediately acted upon Schmidt's lung tissue.

Since many of our holdings that the cause of action accrues upon the introduction of the harmful substance into the body are malpractice cases, we should note that our accrual rule in such cases developed through special doctrinal pressures to which negligence cases as such have never been subjected. Originally actions for malpractice were premised on the breach of an implied contract to use the standard of care expected of a professional and the breach of that implied promise gave rise to the action for malpractice. Accordingly, the early decisions held, in accordance with the usual warranty rule, that the statute commenced to run from the time of its breach, i. e., when the act complained of took place. (Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760; Capucci v. Barone, 266 Mass. 578, 165 N.E. 653 [1929]; Conklin v. Draper, 229 App. Div. 227, 230, 241 N.Y.S. 529, 532, 533, aff'd. 254 N.Y. 620, 173 N.E. 892, supra; Ranalli v. Breed, 277 N.Y. 630, 14 N.E.2d 195; Golia v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 931, 197 N.Y.S.2d 735, 165 N.E.2d 578.) Whether uncritical acceptance of a fading theory of the basis of malpractice liability has led us astray in computing the time of accrual of the cause of action is of prime importance here. If we adhere to our accrual rule in malpractice cases, after recognizing that they are essentially negligence cases, we see no escape from the conclusion that

we should follow Schmidt in a classic negligence case.

We should put aside the contention, often justifying abandonment of prior holdings, that social change or advancement in the sciences has so altered the subject matter upon which the law operates that a different result is called for. The insidious and "inherently unknowable" nature of cancer and similar diseases was common knowledge in 1936 when Schmidt was decided. The affecting plea of a plaintiff who could not know he was being destroyed from within fell then upon ears no less sensitive to such appeals than those now hearing this case. To our minds, the adoption of and adherence to the accrual rule by the Judges of our court from 1930 onward renders the simple assertion "it is unjust" inadequate.

Considering the function of a Statute of Limitations as a device for repose, a potential defendant's equities are the same whether the plaintiff knows of his condition or not. Repose is as beneficial to society in the one case as in the other. While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the Statute of Limitations in the first place. The existence of a discovery provision in the fraud statute bespeaks a legislative judgment that only in fraud cases, by their very nature, were there a sufficient number of unknown wrongs to justify a departure from the general rule. Apparently the rarity of such unfortunate cases in other types of actions did not outweigh the disadvantages of imposing a possible exception to the grant of repose to every person and industry who could be a potential defendant. It

is hard to say for certain, but perhaps the possibility of feigned cases against unprepared defendants and the difficulties of proof in meritorious cases led to a decision that society is best served by complete repose after a certain number of years even at the sacrifice of a few unfortunate cases. Whatever the policy considerations, the recent amendment of the malpractice statute from two to three years (CPLR, § 214, su l. 6) makes it clear that the legislative choice was deliberately made in the face of strenuously advocated alternatives. (See 1942 Report of N.Y. Law Rev. Comm., pp. 141-143, recommending a discovery provision with an outside limit of six years. A similar recommendation was made in 1962. See N.Y.Legis. Doc., 1962, No. 65 [C].)

It is not without reason that change in this area has been thought by us to be the responsibility of the Legislature. Our court has no facilities, to inquire into the incidence of hardship cases under the statute, nor the peculiarly legislative prerogative to balance the result of such an inquiry against the countervailing considerations of prudence and social tranquillity that are supposed to justify Statutes of Limitations. Moreover, how could we set limits to the right plaintiff would have us grant? Is it for a court to say that there shall be an outside limit of six years? If so, what is the fact that 15 years passed before plaintiff brought this action?

The judgment should be affirmed, without costs.

DESMOND, Chief Judge (dissenting).

The complaint, sounding in both negligence and breach of warranty, alleges that while plaintiff was a patient

in a hospital in 1944 there was injected into his nasal sinuses a substance manufactured by defendant but that it was not until 1957 that plaintiff learned that this substance was radioactive and carcinogenous and had caused a cancerous condition in his nose. This suit was commenced in 1959. It has been dismissed below as to negligence because not brought within three years after the injection (Civ.Prac.Act, § 49, subd. 6) and as to breach of warranty because not instituted until more than six years thereafter (Civ.Prac.Act, § 48 subd. 1).

As the complaint stands, the limitation periods have run since the pleading says no more than that plaintiff did not learn of the dangerous qualities of the preparation until 1958, 14 years after the injection. From his brief and his oral argument, however, it seems that his theory of action is that the carcinogenic qualities of the injection were not discoverable by him until after the 1957 surgical operation. If that be the fact, it would be unreasonable and perhaps unconstitutional to hold that his time to sue expired before it was possible for him to learn of the wrong (see Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282; Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277; Ricciuti v. Voltare Tubes, 2 Cir., 277 F.2d 809; Handler v. Remington Arms Co., 144 Conn. 316, 130 A.2d 793; 63 Harv.L.Rev. 1177, 1207). Statutes (including limitation laws) are not to be construed so as to deny the right to sue for a common-law wrong (Rexford v. Knight, 11 N.Y. 308, 313; People v. Turner, 117 N.Y. 227, 22 N.E. 1022; Gilbert v. Ackerman, 159 N.Y. 118, 124, 53 N.E. 753, 754, 45 L.R.A. 118; Shanahan v. Monarch Eng. Co., 219 N.Y. 469, 114 N.E. 795; Borgia v. City of New York,

12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777.) Schmidt v. Merchants Desp. Transp. Co. (270 N.Y. 287, 200 N.E. 824, 104 A.L.R. 450), if and to the extent that it is inconsistent with these views, should be re-examined.

The judgment should be affirmed, without costs, with leave to plaintiff, if so advised, to serve an amended complaint.

DYE, VAN VOORHIS, FOSTER and SCILEPPI, JJ., concur with BURKE, J.

DESMOND, C. J., dissents in an opinion in which FULD, J., concurs.

Judgment affirmed.

Judgment and Amended Remittitur of Court of Appeals of New York

No. 252

NATHAN CARL SCHWARTZ,

Appellant,

vs.

HEYDEN NEWPORT CHEMICAL CORPORATION & ANO.,

Respondents.

BE IT REMEMBERED, That on the 9th day of June in the year of our Lord one thousand nine hundred and sixty-two, Nathan Carl Schwartz, the appellant in this cause, came here into the Court of Appeals, by Alfred S. Julien, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Heyden Newport Chemical Corporation & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Fulton, Walter & Duncombe, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Alfred S. Julien, of counsel for the appellant, and by Mr. Harmon Duncombe, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from

Judgment and Amended Remittitur of Court of Appeals of New York

herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: appellant contended that the statute of limitations commenced to run in 1957, when he first was able to discover an injury caused by a 1944 injection of a carcinogenic substance, and that a holding by this Court as a matter of law that the actionable injury was sustained prior to that time would deprive appellant of due process of law in violation of the Fourteenth Amendment to the United States Constitution. The Court of Appeals held that in an action for personal injuries caused by negligence the cause of action accrues and the statute of limitations commences to run when the negligence produces injury and that the injury occurred when the harmful substance first acted upon appellant's body at or about the time of injection in 1944, appellant's lack of knowledge notwithstanding.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, &c., without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of

Judgment and Amended Remittitur of Court of Appeals of New York

the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, January 23, 1963.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk.